

The Honorable Michael C. Burgess

***Is there a critical role that Congress can play in this discussion? What do you think are the top two ways in which this Committee and Congress can address barriers to digital trade for small tech companies like your members?***

Yes, Congress can play a critical role in the digital trade space. First, Congress—and the Subcommittee on Digital Commerce and Consumer Protection in particular—should exercise its oversight authority and empower trade negotiators in their efforts to ensure the free flow of data across national borders to give American innovators, particularly small and medium-sized enterprises (SMEs), opportunities to grow their customer bases and create more American jobs. For example, the negotiating objectives set forth by the United States Trade Representative (USTR) for the North American Free Trade Agreement (NAFTA) seek to “establish rules to ensure that NAFTA countries do not impose measures that restrict cross-border data flows . . .” ACT | The App Association strongly supports this negotiating objective. But as the negotiation over the trade agreement progresses, some of our most important priorities could be sacrificed for others without congressional input.

As the former chairman of the Subcommittee, we appreciate your efforts to position the Subcommittee as a leader on digital trade issues. Your work in highlighting the trade barriers that prevent cross-border data flows is vitally important and helps ensure that our negotiators understand that such safeguards should remain part of NAFTA and future trade agreements. The International Trade Commission (ITC) estimates that U.S. GDP increased significantly (between 3.4 percent and 4.8 percent) in 2011 as a result of digital trade. That year, ITC estimated that digital trade helped create 2.4 million jobs in the United States,<sup>1</sup> and the role of cross-border data flows in today’s economy has only expanded. The growth that the digital economy drives depends heavily on the ability for U.S. companies, particularly SMEs, to easily access new markets seamlessly transferring data across political borders. This need must be a top trade negotiation priority in NAFTA and other negotiations, but is potentially jeopardized when our trade negotiators must focus on so many other aspects of the economy. Therefore, as part of these efforts, the Subcommittee has, and should continue to, lead Congress in providing a forum for experts, industry, and policymakers to publicly discuss, craft, and promote a single U.S. position on digital trade that maintains cross-border data flows as a top priority (along with other key digital trade priorities I detailed in my written and oral testimony) through further hearings and oversight activity. This activity would help by a) reinforcing the importance of digital trade to Congress and other stakeholders; and b) cementing the Subcommittee’s role as an expert body and leading policymaker in the digital trade debate.

Second, it is imperative that Congress provide as much legal certainty as possible to U.S. businesses seeking to leverage the growing digital economy to expand their businesses and create new American jobs, particularly the SMEs that do not have the resources that large corporations may have to account for such uncertainties. As a leading example, the App Association calls on Congress to resolve threshold liability questions related to warrants and data stored abroad by passing the International Communications Privacy Act (ICPA, H.R. 3718) as soon as practicable. ICPA would clarify when and how U.S. law enforcement agencies may access data pertaining to foreign persons stored by U.S. communications providers overseas. As the law in this area is

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<sup>1</sup> <http://www.usitc.gov/publications/332/pub4485.pdf>.

unclear and unlikely to be fully clarified by a pending case at the U.S. Supreme Court (*United States v. Microsoft*), ICPA's passage is timely and needed. Enacting ICPA, or legislation like it, would reduce crippling legal uncertainty for our member companies and other American businesses looking to access overseas markets. It would also provide cover to American trade negotiators as they seek to show foreign governments that our privacy protections are equal to theirs. It is unfortunately common for policies that interrupt data transfers to be based, at least in part, on a mistrust of U.S. approaches to data privacy. More must be done to ensure that companies conducting business abroad do not face conflicts between law enforcement requests and foreign laws. We believe that ICPA would ameliorate these conflicts between foreign laws and U.S. law enforcement agencies' authority to obtain data pertaining to foreign citizens, which would in turn remove a trade barrier. Further, ICPA would ensure that the United States continues to lead other nations in providing for rule of law and due process.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is fluid and cursive, with the first name "Morgan" and last name "Reed" clearly distinguishable.

Morgan Reed  
President  
ACT | The App Association